IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1183 OF 2004

Sandhya @ Akka Sunil Nimbalkar ..Appellant

versus

Sunil Nivrutti Nimbalkar ..Respondent.

Ms. Revati Dere for the Appellant

Shri A.B.Avhad for the Respondent

Coram : S.R.Sathe, J.
Dated : 31st Jan, 2006

ORAL JUDGMENT

1. By consent heard finally at admission stage.

2. The substantial question of law which falls for consideration in this appeal is whether the petition filed by the husband for nullity of marriage on the ground mentioned in section 12(1)(d) of the Hindu Marriage Act, 1955, (hereinafter referred to as the said Act) on the day of reopening of the Court after vacation, during which the period of one year mentioned in Section 12(b)(ii) of the said Act was over can be entertained in view of the provisions of Section 4 of the Limitation Act, 1963.

3. Brief facts giving rise to this appeal are

as under :

. The marriage between appellant Sandhya Nimbalkar and respondent Sunil Nimbalkar was fixed in January 1998. Thereafter the respondent used to take the appellant out for shopping and meeting friends. They had also gone for outing. During the said period the appellant and respondent had sexual intercourse with each other. Their marriage took place as per the Hindu Marriage rites on 19.5.1998. As a result of premarital intercourse the appellant conceived a child. When she disclosed the said fact to her mother in law, she was sent to her mother's home for Nagpanchami festival. Thereafter the respondent asked the appellant to abort the child. Accordingly abortion took place. Thereafter, on 21.5.1999 the respondent sent a notice to the appellant through Advocate alleging therein that the appellant was at the time of marriage pregnant by some person other than the respondent. Not only that, but on 7.6.1999, the respondent filed petition for annullment of marriage under section 12(1)(d) of the said act.

4. The said petition was obviously not within

one year from 19.5.1998. The period of one year was completed on 18.5.1999. However, at the relevant time there was summer vacation and the court was closed. So, the respondent filed the said petition on reopening day after the summer vacation i.e. on 7.6.1999.

5. The appellant filed her written statement at exhibit 10 and admitted the factum of marriage. She also contended that after their marriage was fixed, the respondent had taken her to village Nhavre by representing that they wanted to go for marketing and parents of respondent wanted to see her. It is her contention that she had accordingly gone with respondent in first and second week of February 1998 the respondent had sexual intercourse with her. She also contended that when this was disclosed to her mother in law as well as to the respondent, at their instance the child was aborted. She, therefore, contended that the allegations made by the respondent that at the time of marriage she was pregnant from any other person, other then the respondent is false.

6. The appellant also contended that as the

application under Section 12 of the said Act is not filed within one year from the date of marriage as contemplated by Section 12(2)(b)(ii), the same is not maintainable.

7. On these pleadings, the trial Court framed issues at exhibit 17. After considering the evidence adduced by both the parties the learned trial Judge came to the conclusion that the respondent has proved that at the time of marriage the appellant was pregnant from some other person then the respondent. The trial court also held that the provisions of Section 4 of the Limitation Act, 1963 are applicable and as such the petition is maintainable. He, therefore, passed the decree for annullment of the marriage.

8. The above mentioned decree was challenged by the appellant in the District Court, Pune. After hearing the arguments of both the learned Advocates, the First Appellate Court also came to the conclusion that the finding recorded by the trial judge is legal and correct. He therefore confirmed the decree for annullment of marriage passed by the trial court.

9. Being aggrieved by the above mentioned judgment and order the appellant has filed the present Second Appeal. In this appeal before me Smt. Revati Dere, the learned Advocate for the appellant has urged only one point. She submitted that both the courts below have wrongly held that the provisions of Section 4 of the Limitation Act, 1963 are applicable to the facts of the present case. According to her having regard to the provisions of Section 12(2)(b)(ii) of the said Act and Section 29(3) of the Limitation Act, the provisions of Section 4 of the Limitation Act are not applicable to the facts of the present case. She, therefore, submitted that the petition for annullment of marriage filed after a period of one year is not maintainable. She, therefore, submitted that the appeal be allowed and the decree of annullment of marriage passed by the court's below be set aside and the petition filed by the respondent be dismissed.

10. As against this Mr.Avhad, learned advocate for the respondent supported the judgment and order passed by the court's below.

11. It is not in dispute that the marriage of appellant and respondent took place on 19.5.1998 and the suit for annulment of marriage was filed by the respondent on 7.6.1999 i.e. on the reopening day after summer vacation, but after the period of one year was over from the date of marriage. So, the question is whether the court was right in entertaining the said suit having regard to the provisions of Section 12(2)(b)(ii) of the said Act. In order to answer the above posed question it would be worthwhile to see the relevant provisions. The same are as follows:

> . **12. Viodable marriages.-(1)** Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:
>
> (a) .....
>
> (b) .....
>
> (c) .....
>
> (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.
>
> (2) Notwithstanding anything contained in sub-section (1), no petition for

annulling a marriage-

(a) .....

(i) .....

(ii) .....

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied-

(i) that the petitioner was at the time of marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of (the said ground).

12. As the learned Advocate has argued that having regard to the provisions of Section 29 and Section 4 of the Limitation Act, the Court was justified in entertaining the suit. Let us see the relevant provisions. It reads as follows :

. **4. Expiry of prescribed period when court is closed.**- Where the prescribed period for any suit, appeal or application expires on day when the court is closed, the

> suit, appeal or application may be instituted, preferred or made on the day when the court reopens.
>
> . **Section 29 (2).** Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

The learned Advocate for the Appellant strenuously argued before me that the provisions of Section 29(2) of the limitation Act are not applicable and in fact the provisions of Section 29(3) are applicable and the provisions of Section 4 of the Limitation Act are also not applicable because by virtue of Section 12(2)(b)(ii) no period of limitation has been infact prescribed. According to her the said provisions of limitation Act are in fact not applicable to the facts of the present case. In order to substantiate this proposition she has drawn my attention to the case **Savlaram Kachroo Mhatre v/s. Yashodabai Savlaram Mhatre AIR 1962 Bom. 191.** That was also the case where petition

under Section 12(1)(d) for annulment of marriage was filed on the reopening of the Court but after the period of one year was over and after considering the provisions of 12(2)(b)(ii) and provisions of Section 10 of the General Clauses Act, the Division Bench of this High Court held that such petition cannot be entertained. Their Lordships observed :

> .4 The question then is one of construction of section 12 of the Hindu Marriage Act, 1955. If on a fair construction we can come to the conclusion that it merely prescribes a period during which certain thing may be done or prescribes a terminal date before which something may be done then Section 10 must be applied.
>
> . A fair reading of this section clearly shows that is does not prescribe a period for filing a petition by the plaintiff; it is in terms mandatory and prohibitory and provides that the court shall not entertain the petition if the conditions laid down therein are not satisfied. These conditions are in absolute terms and they cannot be relaxed.
>
> . But so far as condition (ii) is concerned, it is self evident from examination of the plaint and if the examination discloses that the condition is not fulfilled, the Court must dismiss the petition.

It is pertinent to note that this view has been followed by Gujrat High Court in case of Nanikram vs.Drupadiben AIR 1974 Guj.111 wherein also it was

held that Section 12(2)(b)(ii) does not prescribe period of limitation but creates statutory bar for entertainment of petition. Not only that but even in the case **Vellinayagi vs. T. Subramanium AIR 1969 Madras 479** the view of the Division Bench of this High Court was followed. In that case, the Madras High Court has even considered the provisions of Section 29(3) of the Limitation Act and specifically observed that what is laid down in section 12 (2)(b)ii of the said Act is condition subject to which alone the petition for annulling marriage can not be entertained. It is not the period of limitation. Section 5 of the Limitation Act cannot be applied to this case, in view of the specific provisions of Section 29(3) of the said Act. However, it is pertinent to note that both the courts below have not followed the ratio of the above cited ruling and in particular the ratio of Division Bench of this High Court. According to the courts below the facts of the case reported in AIR 1962 Bom.190 and the facts of the present case are different and the provisions of Section 4 of the limitation Act were not considered in the said case. Firstly, it must be noted that facts of the above cited ruling and facts of the present case are

similar. It is true that the provisions of Section 4 of the Limitation Act were not specifically considered by the Division Bench in that case. However, argument was advanced on behalf of the petitioner that in view of the provisions of Section 10 of the General Clause Act filing of petition on reopening day of the court is not objectionable. It would be worthwhile to see what Section 10 of the General Clause Act says. It reads and follows :

> **10.Computation of time :** Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then if the court is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the court of office is open.

It must be noted that the broad principal on which Section 4 of limitation Act is based is that although the parties themselves can not extend the time for doing an act in the court, yet if the delay is caused, not by the act on their own, but by some act of the court itself, such as the fact of the court being closed, they are entitled to do the Act on the first opening day." If we see Section 10 of the General Clause Act, then it is very clear that

the same is also based on the above mentioned principal. So, though the Division Bench had not specifically referred provisions of Section 4 of the Limitation Act, we find that the principal embodied in the said Section was in fact under consideration when reference was made to Section 10 of the General Clause Act. What is important to be noted is that once the Division Bench has come to the conclusion that the period mentioned in Section 12(2)(b)(ii) is in fact not the period of limitation there was no question of application of any of the provisions of Limitation Act. Section 4 would be applicable only in respect of case where the period of limitation is to be counted and it is to be seen whether the filing is in time or not. But once it is said that the period referred in Section 12(2)(b)(ii) is not period of limitation, there is no question of application of Section 4 of the Limitation Act or Section 10 of the General Clause Act.

13. The learned Advocate for the Respondent has laid his hands on a case **Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker (1995) 5 SCC 5.** In that case. Their Lordships were considering the provisions of Section 18 of Kerala Rent Control Act

to condone delay in filing the appeal after expiry of period of limitation prescribed under it and applicability of Section 29(2) and 5 of the limitation Act. Their Lordships held that though Kerala Rent Control Act was special Act, still having regard to the provisions of Section 18, Sections 29(2) of the Limitation Act and Section 5 of the Limitation Act are applicable. The ratio of the above cited case is not in dispute and cannot be disputed. However, it must be noted that while considering the case in hand we have to take into consideration the specific provisions of Section 29(3) of the Limitation Act and not Section 29(2), so the above cited ruling is of no help to the respondent.

14. The learned Advocate for the respondent has also placed reliance on a case **Smt. Lata Kamat v. Vilas (1989)2 SCC 613.** That was also a case arising out of Hindu Marriage Act, 1955. The question before their Lordship was whether the appeal filed as per the provisions of Section 28 of the Hindu Marriage Act was in time and whether Section 4 to 24 of the Limitation Act are applicable to the said appeal. While considering this point, their

Lordships held that the provisions of Section 3 and the provisions of Section 4 to 24 of the Limitation Act are applicable to appeal filed as per the provisions of Hindu Marriage Act. However, that does not mean that the provisions of Section 4 are also applicable to a marriage petition filed under Section 12(2)(1)(d) of the said Act. in fact, in this case their Lordships have observed :

> . Sub Section 3 of this Section (Section 29) provides that the provisions of this Act shall not apply to any suit or other proceeding under any marriage law.

It is therefore clear that so far as sub section 3 is concerned, the impact of it will be that the provisions of Limitation Act will not apply so far as the suit or the original proceeding under the Act is concerned but sub section 3 will not govern the appeal. So, having regard to these specific observations, I am not inclined to hold that the ratio of this case is that the provisions of Section 4 of the Limitation Act are applicable to the marriage petition filed under Section 12(1)(b) of the said Act.

15. In view of the above, it is very clear that the finding recorded by the Courts below is against the provisions of law and against the view taken by the Division Bench of this Honourable Court in AIR 1962, Bom. 190 and as such the same has to be set aside. I, therefore, pass the following order:

ORDER

. The Appeal is allowed.

. The decree for annullment of marriage passed
by the Courts below is set aside and Hindu Marriage Petition No.144 of 1999 is dismissed.

. Under the circumstances of the case, the parties to bear their own cost.

(S.R.Sathe, J.)

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Shri A.B.Avhad for the Respondent

Coram : S.R.Sathe, J.

Dated : 31st Jan, 2006

Final Order.

. The Appeal is allowed.

. The decree for annulment of marriage passed by the Courts below is set aside and Hindu Marriage

Petition No.144 of 1999 is dismissed. Under the circumstances of the case parties to bear their own cost.